STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 7, 2003
v	No. 228727 Saginaw Circuit Court
MICHAEL ANTHONY MITCHELL, Defendant-Appellant.	LC No. 98-015508-FH ON REMAND

Before: Kelly, P.J., and Saad and Smolenski, JJ.

PER CURIAM.

This case is before us by order of our Supreme Court[1] that, in lieu of granting leave to appeal, vacated our previous opinion[2] and remanded the case to us for reconsideration in light of *People v Hardiman*, 466 Mich 417; 646 NW2d 158 (2002). Upon reconsideration, we affirm defendant's conviction and sentence.

I. Facts and Procedural History

After a second trial, defendant was convicted by a jury of possession with intent to deliver more than 50, but less than 225 grams of cocaine, MCL 333.7401(2)(a)(iii), for which he was sentenced to 32 to 50 years' imprisonment as a fourth-habitual offender, MCL 769.12.[3]

In February 1998, Saginaw city police officers Diane Meehleder and Lerone Clement were patrolling a residential neighborhood. At approximately 1:15 p.m., they noticed

[1] *People v Mitchell*, order of the Supreme Court, entered April 1, 2003 (Docket No. 122720).

[2] *People v Mitchell*, unpublished opinion per curiam of the Court of Appeals, issued October 11, 2002 (Docket No. 228727). We note that when our entire judgment is vacated, we are required to reconsider each issue raised on appeal because the law of the case doctrine does not apply. *City of Troy v Papadelis (On Remand)*, 226 Mich App 90, 94; 572 NW2d 246 (1997).

[3] Defendant's first trial resulted in a hung jury with respect to the charge of possession with intent to deliver more than 50, but less than 225 grams of cocaine. The jury found defendant guilty of fleeing and eluding a police officer, MCL 750.479a, for which defendant was sentenced to one year's probation.

defendant's vehicle make a wide turn nearly causing an accident. The officers stopped defendant's vehicle for improper lane usage and Officer Meehleder obtained the requested documents from defendant. In response to defendant's inquiry regarding the reason for the stop, Officer Meehleder told him that she would tell him after she obtained more information on him. Defendant was loud and argumentative, contending that it was another vehicle of the same color that committed the traffic violation. Defendant was also sweating profusely and moving nervously. Concerned about defendant's movements and attitude, Officer Clement asked him to put the vehicle in park and requested permission to search defendant and the vehicle for weapons. Instead of complying, defendant sped away from the scene at approximately sixty to seventy miles per hour.

When defendant turned onto Simoneau Street, the officers were just getting into their car. They lost sight of defendant when he turned. They regained sight of defendant when they turned onto Simoneau, at which time defendant was three-quarters of the way down the street. When they saw defendant, he was in the middle, slightly on the wrong side, of the street. He then made a wide turn. At no point during the chase did either officer see defendant throw anything from the vehicle.

After driving around the neighborhood and talking with residents, the officers eventually found defendant's vehicle near a fence. Defendant was not in the vehicle or within sight. With further direction from residents, Officer Clement discovered defendant crouching behind a house. Upon seeing Officer Clement, defendant ran through several back yards and climbed over three fences. When Officer Clement caught up with defendant, defendant gave no further resistance and was taken into custody. Officer Clement found $100 on defendant. He also found $480 on the ground near defendant's vehicle.

Approximately ninety minutes after the initial stop, and during a search of the area, Officer Meehleder discovered a plastic bag in a pile of leaves and debris near the sidewalk on the north side of Simoneau approximately mid-block. The bag, containing 112.7 grams of crack cocaine, was approximately fifteen to twenty feet from where defendant drove. When Officer Meehleder found the bag, it was dry, although the ground beneath was wet.[4] The officers also noticed muddy tire tracks near the curb close to where the drugs were found.

Defendant's testimony from his first trial was read into the record. Defendant testified that he sped away from Officers Clement and Meehleder because he feared they were going to put him in jail for arrearages in child support payments. Defendant testified that after fleeing from the site of the traffic stop, he went to his aunt's house on Thompson Street, where he abandoned his vehicle and ran. While climbing a fence, he dropped the money that police later found. Defendant stated he was given $500 by Gene Mixon to pay a bill for him. Defendant testified that the window of his vehicle remained down while he fled from the officers.

[4] When the officers began their shift at noon, it was raining; it was not raining during the stop, the pursuit, or the search of the area.

Gene Mixon, testified that defendant was not an employee, but he rented space in Mixon's garage to detail cars. Mixon gave defendant $500 to pay his Consumers Energy bill, a common practice of Mixon. Mixon's Consumers Energy bill, dated February 11, 1998, was $994.33. Mixon did not give defendant the bill, just the money. Mixon received a telephone call from defendant, who told him he was in jail and would see Mixon when he was released. Defendant did not tell Mixon why he was in jail. Defendant did not tell Mixon what happened to his money until after he was out of jail and spoke to Mixon in person. When Mixon spoke to defendant in person, defendant, "said they stopped him and said that he had drugs, but you know, he said [sic] didn't have no drugs." Defendant did not tell Mixon why he ran from the police. Mixon testified that defendant never told him he had drugs and he never saw defendant involved in drug activity. However, Officer Clement testified that, during an interview with Mixon, Mixon gave conflicting statements about when he gave defendant the money and whether defendant worked for him. Officer Clement also testified that Mixon said defendant told him "he had been caught with drugs."

After deliberations, the jury found defendant guilty as charged and he was sentenced in the manner described above.

II. Sufficiency of the Evidence

Defendant argues that the evidence was insufficient to establish that he possessed the cocaine. After reviewing the record and applying the principles set forth in *People v Hardiman, supra*, we disagree.

This Court reviews a defendant's allegations of insufficiency of the evidence de novo. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001). In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecutor to determine whether a rational trier of fact could find the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). However, this Court should not interfere with the jury's role of determining the weight of the evidence or the credibility of the witness. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, amended 441 Mich 1202 (1992). Circumstantial evidence and reasonable inferences that arise therefrom can constitute satisfactory proof of the elements of the crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). Further, it is for the trier of fact, not this Court, to determine what inferences can be fairly drawn from the evidence and the weight accorded to those inferences. *Hardiman, supra* at 428. All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

The elements of possession with intent to deliver more than 50, but less than 225 grams of cocaine are: "(1) the defendant knowingly possessed a controlled substance; (2) the defendant intended to deliver this substance to someone else; (3) the substance possessed was cocaine and the defendant knew it was cocaine; and (4) the substance was in a mixture that weighed between 50 and 225 grams." *People v Crawford*, 458 Mich 376, 389; 582 NW2d 785 (1998).

Defendant argues that the prosecution failed to prove the first element--that defendant knowingly possessed the cocaine found by the police. "A person need not have actual physical possession of a controlled substance to be guilty of possessing it. Possession may be either actual or constructive." *Wolfe, supra* at 519-520. When determining whether the defendant

constructively possessed the controlled substance, "the essential question is whether the defendant had dominion or control over the controlled substance." *People v Konrad*, 449 Mich 263, 271; 536 NW2d 517 (1995). "A person's presence, by itself, at a location where drugs are found is insufficient to prove constructive possession. Instead, some additional connection between the defendant and the contraband must be shown." *Wolfe*, *supra* at 520. Constructive possession exists when there is a sufficient nexus between the defendant and the contraband. *People v Johnson*, 466 Mich 491, 499-500; 647 NW2d 480 (2002). Generally, "a person has constructive possession if there is proximity to the article together with indicia of control." *People v Burgenmeyer*, 461 Mich 431, 438; 606 NW2d 645 (2000).

In compliance with our Supreme Court's order, we reviewed this case in light of *Hardiman, supra*. The *Hardiman* Court held that an inference can be built on an inference in order to establish an element of an offense. *Hardiman, supra* at 428. The Court further stated, "It is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *Id*.

In this case, defendant fled from the police, who then gave chase. After retracing defendant's route a mere ninety minutes later, the police discovered a bag of crack cocaine which was dry on an otherwise wet road. Also, defendant was found with $100 on his person and another $480 was found near his vehicle. The window in defendant's vehicle was in the down position and defendant testified that it had remained in that position. Furthermore, Mixon's aggregate testimony was equivocal as to whether he actually gave defendant $500 to pay a bill, and his credibility was further attacked when he gave conflicting testimony regarding whether defendant told Mixon he had been caught with drugs. Given all these circumstances, the jury inferred that defendant disposed of the bag of cocaine during the time that the police lost sight of defendant. Viewing the evidence in the light most favorable to the prosecution, resolving all conflicts in its favor, and leaving to the jury the questions of witness credibility, what inferences could be fairly drawn, and the weight they should be afforded, we believe the evidence was sufficient to support defendant's conviction.

III. Double Hearsay Evidence

Defendant argues that the trial court erred in admitting, under the guise of impeachment, double hearsay testimony by an investigating officer regarding what defendant's business associate told the officer defendant had said. Again, we disagree.

The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made, *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000), or the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias, *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002).

Officer Clement testified that Mixon stated that defendant told him "he had been caught with drugs." Following a double hearsay objection by defense counsel, the trial court instructed the jury that Officer Clement's testimony regarding what Mixon told him defendant had said

could be used only in determining Mixon's credibility, not as substantive evidence of defendant's guilt.

Had Mixon testified directly that defendant told him he had been caught with drugs, then the statement would have been admissible as a statement by a party-opponent and thus, not hearsay. MRE 801(d)(2)(A). Officer Clement's recitation of the statement would constitute hearsay if it was admitted to prove the truth of the matter asserted. MRE 801(c). However, the trial court admitted the statement only for impeachment purposes of Mixon, not as substantive evidence. Therefore, the evidence was admissible against Mixon as a prior inconsistent statement, which is not hearsay. MRE 801(d)(1)(A).

Defendant asserts that Officer Clement's testimony was impermissibly hearsay because it was admitted only under the guise of impeachment, citing *People v Stanaway*, 446 Mich 643; 521 NW2d 557 (1994), as support for his assertion. In *Stanaway*, the defendant was convicted of three counts of third-degree criminal sexual conduct. At trial, the prosecution called the defendant's nephew, who had allegedly made a prior statement to police that the defendant had told him he had sex with a young girl. The nephew denied making the earlier statement. *Id*. at 689. The prosecution then called the officer who had interviewed the defendant's nephew and the officer testified that the nephew had told him that "on a couple of different occasions while [defendant] was intoxicated, he did state that he had 'screwed a young girl,' and if he was caught, he would be in a lot of trouble." *Id*. at 690. Defense counsel raised a hearsay objection and the judge gave a limiting instruction to the jurors, informing them that the information could only be used to determine whether they believed the nephew, not as substantive evidence. *Id*. On appeal, the Supreme Court found a hearsay error and reversed the defendant's conviction.

The *Stanaway* majority stated:

> While prior inconsistent statements may be used in some circumstances to impeach credibility, this was improper impeachment. The substance of the statement, purportedly used to impeach the credibility of the witness, went to the central issue of the case. Whether the witness could be believed in general was only relevant with respect to whether that specific statement was made. This evidence served the improper purpose of proving the truth of the matter asserted. [*Id*. at 692-693.]

In the case at bar, defendant argues that the facts of *Stanaway* are analogous to the facts of this case and that the prejudicial error of improperly allowing his alleged statement into evidence "likely tipped the scales in favor of the prosecution, in what was an overwhelmingly circumstantial case."

However, defendant overlooks the case of *People v Kilbourn*, 454 Mich 677; 563 NW2d 669 (1997). In *Kilbourn*, the defendant was convicted of assault with intent to do great bodily harm less than murder. The prosecution called the defendant's father and asked him whether he recalled telling police that the defendant was responsible for the shooting in question. The father denied identifying the defendant as the shooter. *Id*. at 680. The prosecution then called the detective who had interviewed the defendant's father and he testified that the father had stated that the defendant was the one who had shot into a house. Defense counsel raised a hearsay

objection and the court overruled it, but gave a limiting instruction to the jury that the statement could only be used to evaluate the father's credibility. *Id*. at 681. On appeal, this Court overturned the conviction, relying on *Stanaway, supra*. *Id*. However, the Michigan Supreme Court reversed, finding that this Court had "apparently misread the rule" set forth in *Stanaway*. *Id*. at 682.

The Supreme Court then clarified the rule of *Stanaway*. It stated that while *Stanaway* provides an exception to the general rule that prior inconsistent statements may be used to impeach even if they directly inculpate the defendant, the exception is a "very narrow" one. *Id.* at 682-683.

> The rule set forth in *People v Stanaway* is that the impeachment should be disallowed when (1) the substance of the statement purportedly used to impeach the credibility of the witness is relevant to the central issue of the case, and (2) there is no other testimony from the witness for which his credibility was relevant to the case." [*Id*. at 683.]

The *Kilbourn* Court found that while the impeaching statements went to the central issue of the case, they were not the only testimony from the defendant's father that was relevant to the case – he had also testified about events that occurred before the shooting and provided information that directly contradicted another witness. *Id*. at 684. Therefore, the Court held that the first prong of the test had been met, but not the second, and reinstated the defendant's conviction.

In the present case, the first prong of the *Stanaway* rule was met because defendant's alleged comment to Mixon amounted to a confession that he possessed drugs. Such a statement was entirely relevant to the central issue of the case. However, as in *Kilbourn*, *supra*, the second prong of the rule was not met. Mixon provided other testimony for which his credibility was relevant. He testified that he had given defendant $500 cash to pay a Consumers Energy bill for him, which explained why defendant had been carrying so much cash. Mixon also denied under oath that he had ever seen defendant involved in any apparent drug activity. Both statements were damaging to the prosecution's case, and, therefore, justify the admission of Mixon's prior inconsistent statement for impeachment purposes as non-hearsay under MRE 801(d)(1)(A). Accordingly, the trial court did not abuse its discretion in admitting the statement.

IV. Proportionality of Sentence

Lastly, defendant argues that his sentence is disproportionate considering the offense and its offender. Because the offense occurred before January 1, 1999, the judicial guidelines apply to defendant's sentencing. MCL 769.34(1); *People v Reynolds*, 240 Mich App 250, 253; 611 NW2d 316 (2000). Under the judicial guidelines, when a defendant is sentenced as a habitual offender, this Court reviews the defendant's sentence for an abuse of discretion. *Reynolds, supra* at 252. An abuse of sentencing discretion occurs where the sentence imposed is disproportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

Defendant was sentenced as a fourth-habitual offender to 32 to 50 years' imprisonment. Defendant contends that the most recent barometer of proportionality is the legislative sentencing guidelines, MCL 769.31 *et seq*, and compares his sentence to the corresponding statutory

sentencing guidelines range for his conviction. However, because the legislative guidelines have only prospective, not retrospective application, they are not relevant to our appellate review of the proportionality of defendant's sentence. *Reynolds, supra* at 253.

When a defendant is sentenced as a fourth habitual offender, the trial court has broad discretion to sentence him to any period of incarceration up to life. *People v Crawford*, 232 Mich App 608, 622; 591 NW2d 669 (1998). At defendant's sentencing, the trial court noted that defendant had been convicted of three prior felonies and four misdemeanors and stated, "It's clear to the Court that the defendant doesn't intend to rehabilitate himself." Our Supreme Court stated that "a trial court does not abuse its discretion in giving a sentence within the statutory limits established by the legislature when an habitual offender's underlying felony, in the context of his previous felonies, evidences that the defendant has an inability to conform his conduct to the laws of society." *People v Hansford (After Remand)*, 454 Mich 320, 326; 562 NW2d 460 (1997). Given defendant's pattern of criminal activity, we cannot say that the trial court improperly concluded that defendant was unwilling to reform himself. Therefore, we find that the trial court did not abuse its discretion in sentencing defendant. *Id*.

Affirmed.

/s/ Henry William Saad
/s/ Michael R. Smolenski